UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: April 15, 2009

CBCA 1230

WEST RIDGE, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Robert L. Kenny of Law Office of Robert L. Kenny, San Diego, CA, counsel for Appellant.

Mel Myers, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **HYATT**.

DANIELS, Board Judge.

The General Services Administration (GSA), respondent, asks the Board to deny, on motion for summary relief, an appeal filed by West Ridge, LLC (West Ridge), the lessor of office space to the agency. Because the facts of the case do not permit the straightforward interpretation of the lease that GSA suggests, we deny the motion.

Background

On December 2, 2005, GSA issued a solicitation for offers to lease approximately 6255 rentable square feet of space for government offices in the San Diego, California,

metropolitan area. In addition to requesting "[a] lease rate per square foot for the building shell rental, fully serviced," Appeal File, Exhibit 1 at 6, the solicitation contained several provisions regarding a tenant improvement allowance. Among them were the following:

> 1.9 **TENANT IMPROVEMENTS (SEP 2000)**
>
> A. The Tenant Improvement Allowance shall be used for building out the Government-demised area in accordance with the Government-approved design intent drawings. All Tenant Improvements required by the Government for occupancy shall be performed by the successful Offeror as part of the rental consideration . . . .
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> B. The Tenant Improvement Allowance shall include all the Offeror's administrative costs, general contractor fees, subcontractor's profit and overhead costs, Offeror's profit and overhead, design costs, and other associated project fees necessary to prepare construction documents to complete the Tenant Improvements. . . . **NO COSTS ASSOCIATED WITH THE BUILDING SHELL SHALL BE INCLUDED IN THE TENANT IMPROVEMENT PRICING.**
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> * * *
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> **1.7 HOW TO OFFER (SEP 2000)**
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> E. IMPORTANT CLARIFICATIONS TO OFFER REQUIREMENTS:
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> 1. Rate structure . . . shall include the following:
>
> . . . .
>
> d. The annual amortized cost of the Tenant Improvement Allowance. Such amortization shall be expressed as a cost per usable and rentable square foot per year. Tenant Improvements shall be all alterations for the Government-demised area above the building shell buildout. The maximum Tenant Alteration Allowance shall be $44.81 per ANSI/BOMA Office Area square foot. Such alterations shall be described and identified in the drawings used to construct the Government-demised area. The Tenant Alteration Allowance, which

is to be provided by the Lessor to the Government for Tenant Improvements, shall be made available at lease execution.

* * *

1.10 TENANT IMPROVEMENT RENTAL ADJUSTMENT (SEP 2000)

A. . . . .

1. The Government, at its sole discretion, shall make all decisions as to the usage of the Tenant Improvement Allowance. The Government may use all or part of the Tenant Improvement Allowance. The Government may return to the Lessor any unused portion of the Tenant Improvement Allowance in exchange for a decrease in rent according to the amortization rate over the firm term.

. . . .

4. Payment will not be made by the Government in instances where the Government accepts fixtures and/or other Tenant Improvements already in place.

Id. at 6-7.

West Ridge, LLC responded to this solicitation on January 6, 2006, with a proposal to lease space in a building it owned in Rancho Bernardo, California. The proposal contained this provision regarding tenant improvements: "Lessor shall contribute up to Twenty Dollars ($20.00) per square foot for the remodeling of the interior premises. The Lessor may agree to provide additional amortized tenant improvement dollars to the premises." Appeal File, Exhibit 2 at 2.

On March 9, 2006, GSA re-opened the offering period for this solicitation and provided to West Ridge a copy of amendment 1 to the solicitation. Appeal File, Exhibit 3. GSA called to West Ridge's attention paragraph 1.7 of the solicitation, as modified by amendment 1. The amendment modified paragraph 1.7.E.1.d, set out above, by deleting from the sentence, "The maximum Tenant Alteration Allowance shall be $44.81 per ANSI/BOMA Office Area square foot," the word "maximum." *Compare id.*, Exhibit 1 at 6, *with id.*, Exhibit 4 at 4 of amend. 1.

On March 22, 2006, West Ridge submitted a proposal in a format considerably more extensive than the format in which its initial proposal was presented. Appeal File, Exhibit 4. Included in the proposal was a GSA form 1364, completed with the following information:

-- In box 8A, "Shell rental rate," West Ridge offered 6202 rentable square feet.

-- In box 8B, "Amortized tenant buildout," under "sq. ft. per year (rentable)," West Ridge inserted "$3.24," and under "total annual amount," it inserted "$20,094.80," the product of 6202 times $3.24.

-- Within the spaces entitled "Space buildout & amortization," West Ridge inserted the following numbers:

Box 9A, "TI Allowance/u.s.f. (See Section 1. Of the SFO)": $14.81

Box 9B, "Minimum U.S.F. Required (for evaluation purposes)": 5440

Box 9C, "Total T.I. Allowance (9A x 9B)": $80,566

Box 9D, "Amort. rate": 9%

Box 10, "Amort. of tenant buildout": $3.24/r.s.f. (per year)

-- In box 12b, West Ridge stated: "Offeror's estimated total buildout cost to prepare the space for Government occupancy $14.81 (see 9A) and estimated amortization rate for buildout 9% (see 9D). **Offer Includes $30.00 per square foot in the Shell Rate."

-- Within box 21, "Alternates - additional remarks or conditions with respect to this offer," West Ridge stated: "The Landlord will provide a total Tenant Improvement Allowance of $44.81 per usable square foot. The amount of $30.00 per square foot is included in the shell rate. Additionally, $14.81 per usable square foot, shall be amortized at 9% per annum over the firm lease term."

Id. at GSA form 1364.

West Ridge's proposal was written by Bruce Sanders, a commercial real estate broker who has served as the exclusive broker for West Ridge since 1999, and approved by Barbara Schuyler, West Ridge's managing member. Declaration of Bruce Sanders (undated, but filed

Feb. 17, 2009) ¶¶ 1-2, 11-14; Declaration of Barbara Schuyler (Feb. 12, 2009) ¶¶ 1-2, 9. According to Mr. Sanders and Ms. Schuyler, West Ridge intended in this proposal "to satisfy the total tenant improvement allowance using the existing improvements in the space that it valued at $30.00 per square foot; and West Ridge would make up the difference by paying an additional $14.81/s.f., which would be amortized over the firm lease term." Sanders Declaration ¶12; Schuyler Declaration ¶ 9.

After GSA received West Ridge's March 22, 2006, proposal, the agency contracting officer recently assigned to the procurement, Charles D. Knauer, evaluated the offer. Mr. Knauer understood that West Ridge was offering a tenant improvement allowance of $14.81 per square foot and proposed to amortize $80,566 of rent for this allowance. He decided that the allowance should be addressed in negotiations. Deposition of Charles D. Knauer (Oct. 23, 2008) at 52-57; Appeal File, Exhibit 6. Mr. Knauer then wrote a letter to Ed McBee of JEM & Associates calling for negotiations and stating that the tenant improvement cost would be addressed. Appeal File, Exhibit 5.

Mr. McBee's role in this drama was perceived differently by the various actors. Mr. Knauer thought that Mr. McBee was representing West Ridge. Appeal File, Exhibit 25 at 2, 3, 5; Knauer Deposition at 103-04. Ms. Schuyler says that West Ridge has never had a broker relationship with Mr. McBee, however. Schuyler Declaration ¶ 2. She and Mr. Sanders thought Mr. McBee was working for GSA. *Id.* ¶ 4; Sanders Declaration ¶ 3. Mr. McBee testified at his deposition that he is a real estate broker who specializes in tenant and buyer representation and had assisted GSA in finding space previous to this affair. He said that he had no formal written agreement with GSA or West Ridge and had been helping Mr. Knauer's predecessor as contracting officer by being "just a finder" who served as the contact point for transmitting the solicitation from GSA to offerors like West Ridge. Deposition of Ed McBee (Oct. 22, 2008) at 6-8, 13-14, 40, 56.

Mr. McBee was present, along with Mr. Knauer, Mr. Sanders, and Ms. Schuyler, for the negotiation session on May 4, 2006. What transpired there, with regard to the tenant improvement allowance, is in dispute.

-- Mr. Knauer's version: He made clear that the Government was going to gut the space it would rent and planned to use an allowance of $44.81 per square foot to build out the space anew. He told the West Ridge representatives they needed to increase the number in box 9A of form 1364 (tenant improvement allowance per square foot) to $44.81. He explained that no costs associated with the building shell could be included in the allowance. The West Ridge representatives said they understood this and would revise their offer. Knauer Deposition at 91-97, 108-09.

-- Mr. McBee's version: Mr. Knauer understood that West Ridge had offered to satisfy the requirement for the tenant improvement allowance with a credit for part of the amount specified in the solicitation. At the meeting, Mr. Knauer noted that no credit would be allowed for existing tenant improvements and "explained pretty clearly what GSA was looking for." McBee Deposition at 25, 30, 42, 68-69.

-- Mr. Sanders' and Ms. Schuyler's version:

> During the meeting Mr. Knauer discussed the definitions of "shell" and "tenant improvements." He asked us if we understood the difference, and I told him we did. . . . Mr. Knauer never said that GSA expected West Ridge to "gut" its space and then rebuild it using the tenant improvement allowance. Nothing Mr. Knauer said at the meeting indicated to me that West Ridge's proposal to pay a tenant improvement allowance of $14.81/s.f. to modify the existing improvements was unacceptable to GSA.

Sanders Declaration ¶ 16; *see also* Schuyler Declaration ¶ 10.

Following this meeting, Mr. Knauer requested best and final offers. Appeal File, Exhibit 7. On May 12, 2006, West Ridge submitted its best and final offer, which included a form 1364. *Id.*, Exhibit 8. The entries in boxes 8A, 8B, 9A-D, 10, 12b, and 21 of the form 1364 were unchanged from the firm's March 22 offer. *Compare id.*, Exhibit 4, *with id.*, Exhibit 8.

Mr. Knauer reviewed West Ridge's best and final offer. In doing so, he says, he noticed that the entries regarding the tenant improvement allowance had not changed. Knauer Deposition at 114-15. What he did about this situation is in dispute.

-- Mr. Knauer tells this story: At some time prior to May 17, he called Ed McBee and asked why the numbers had not changed. Mr. McBee asked for time to verify West Ridge's intention. Mr. McBee later called back and "advised [Mr. Knauer] that this is how [West Ridge] wanted to structure the deal, but [GSA was] going to get the 44.81 for [its] tenant improvement allowance." Knauer Deposition at 115-16; *see also* Appeal File, Exhibit 25 at 5. Mr. Knauer considered this statement to be a confirmation that GSA would receive the allowance it expected; with this confirmation, a modification of the form 1364 was unnecessary. Knauer Deposition at 117-20; Appeal File, Exhibit 25 at 5. Mr. Knauer also testified that in a meeting on May 17, after the telephone conversations had taken place, Mr. McBee again confirmed that West Ridge was giving GSA a tenant improvement allowance of

$44.81 per square foot. Knauer Deposition at 121-22. In October 2006, Mr. Knauer gave a slightly different version of what had transpired: "This was addressed in letters. Ed McBee was to make the corrections to GSA Form 1364. It never happened." Appeal File, Exhibit 17.

-- Mr. McBee insists that he had no involvement in the preparation of West Ridge's proposal, did not have several conversations with Mr. Knauer regarding West Ridge's form 1364, and did not give Mr. Knauer a verbal assurance that West Ridge was going to provide a tenant improvement allowance of $44.81 per square foot. McBee Deposition at 22-23, 43-46. Mr. McBee stated emphatically, "I certainly never made any assurances regarding the tenant improvement allowance." *Id.* at 46.

On May 17, 2006, Mr. Knauer wrote to a representative of the Army Corps of Engineers, requesting concurrence (on behalf of the prospective tenant, the Marine Corps) in accepting a lease for the space West Ridge had offered. In this letter, Mr. Knauer said that the Marine Corps would receive a maximum tenant improvement allowance of $44.81 per square foot. He described the cost of tenant improvements as "$9.79 per r.s.f. per annum," rather than the $3.24 figure included in West Ridge's proposal. He also quoted a "building shell rate" of $25.06 per rentable square foot, considerably less than the $31.62 proposed by West Ridge. Appeal File, Exhibit 57; *see id.*, Exhibit 8 at 1 of GSA form 1364. At his deposition, Mr. Knauer explained that to arrive at these figures, he had moved $30 per square foot from the shell rate to the tenant improvement allowance and had amortized that amount over the firm lease term. Knauer Deposition at 142-46.

West Ridge and GSA entered into the lease in question on July 18, 2006. Appeal File, Exhibit 9. The lease incorporates the solicitation, as amended. *Id.* at 2. It includes a clause entitled "Tenant Improvement Allowance" which provides, "The maximum Tenant Improvement Allowance has been established by Paragraph 1.7, 'How To Offer.' The Tenant Improvement Allowance shall be amortized over the five (5) year firm term of the lease agreement at an interest rate (amortization rate) of 9% per year." *Id.* at 3. Paragraph 1.7, as amended by amendment 1, *see* above, includes the sentence, "The Tenant Alteration Allowance shall be $44.81 per ANSI/BEMA Office Area square foot." *Id.* at 9-11. The lease also includes the solicitation itself, which provides that the lease shall consist of five items, one of which is "the pertinent provisions of the offer." *Id.* at 9 of solicitation. Additionally, the lease includes an Integrated Agreement clause which states, "This Lease, upon execution, contains the entire agreement of the parties and no prior written or oral agreement, express or implied, shall be admissible to contradict the provisions of the Lease." *Id.* at 5 of GSA form 3517B. Although the lease states a total annual rent, *id.* at 1, it does not break out any elements of that rent.

In October 2006, during construction of tenant improvements, West Ridge became aware for the first time of a dispute regarding the size of the tenant improvement allowance. Sanders Declaration ¶ 25; Sculler Declaration ¶ 15; *see also* Appeal File, Exhibit 17. West Ridge completed the improvements and provided to GSA an allowance of $240,459.51, or $44.40 per square foot, to cover their costs. Appeal File, Exhibit 23. West Ridge reserved the right to recover, however, the difference between this amount and the amount for which it believed it was responsible. *Id.*, Exhibits 20, 52. On April 26, 2007, it submitted a claim for this difference, $162,123.51. *Id.*, Exhibit 24 at 2-14.

Discussion

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

In its motion, GSA contends that under these standards, it is entitled to prevail because the lease is plainly written, unambiguously provides for a tenant improvement allowance of $44.81 per square foot, is complete, and is fully integrated. The agency insists that what West Ridge entered in box 21 of GSA form 1364 is of pivotal importance: "The Landlord will provide a total Tenant Improvement Allowance of $44.81 per usable square foot. The amount of $30.00 per square foot is included in the shell rate. Additionally, $14.81 per usable square foot, shall be amortized at 9% per annum over the firm lease term." By this entry, GSA says, West Ridge clearly committed itself to providing the entire $44.81 in tenant improvement allowance required by the solicitation. Further, according to the agency, the lessor's interpretation that it was providing a credit of $30 per square foot cannot be accepted because it would render sections 1.9 and 1.10 of the solicitation (which were incorporated into the contract) inoperative; section 1.10 prohibits including part of the allowance in the shell rate. GSA maintains that even if the Board finds the lease ambiguous, it must under the rule of *contra proferentem* construe the ambiguity against West Ridge because the lessor's drafting created the ambiguity.

As West Ridge points out in opposing the motion, matters are not as clear as GSA would have us believe. The lessor's offer contained several provisions in addition to box 21 of GSA form 1364, and reading those other provisions in conjunction with the entry in box 21, it is entirely possible to conclude that West Ridge was offering a tenant improvement allowance of only $14.81 per square foot and taking a credit of $30 for tenant improvements already made (for which GSA would be paying through the shell rate). Indeed, this is the understanding that contracting officer Knauer maintained throughout virtually the entire time

that the procurement process was unfolding. (He also understood that West Ridge's terms conflicted with the solicitation's requirements.) Mr. Knauer abandoned these understandings, according to his deposition testimony, only after Ed McBee confirmed that whatever West Ridge had said in its best and final offer, it was actually offering a tenant improvement allowance of $44.81 per square foot. Mr. McBee has testified, however, that he never provided such confirmation, and on GSA's motion for summary relief, we must accept his testimony as true. Thus, at this point in the proceedings, we must conclude that the contracting officer never had any reason for believing that West Ridge's offer said anything other than what the appellant has maintained consistently.

We also note that Mr. Knauer has acknowledged that the form 1364 was never changed to reflect whatever Mr. McBee told him, making his assertion that the offer was modified suspect. Mr. Knauer's explanation of the lease to the tenant agency, which is different from the interpretations of both parties as presented with reference to the motion for summary relief, lends additional credence to the idea that the document is not clear insofar as it addresses the tenant improvement allowance.

Although the lease says that it is fully integrated, "contain[ing] the entire agreement of the parties," the dispute over the meaning of the form 1364 submitted by West Ridge demonstrates that this characterization is not accurate. The lease does not break out any elements of the rent, such as amortized portions of a tenant improvement allowance. The lease does not incorporate West Ridge's form 1364 explicitly; as close as it comes is incorporating the solicitation, which provides that the lease includes (among other items) "the pertinent provisions of the offer." What those "pertinent provisions" are goes unsaid. Thus, we cannot tell what is integrated in the lease. The document is obviously incomplete, so the integration clause loses its value. *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004).

To the extent that the lease may be ambiguous insofar as it addresses the tenant improvement allowance, we caution that application of the rule of *contra proferentem* may not be appropriate. This rule, which requires that ambiguities in a document be resolved against the drafter, is not applicable where the ambiguity is patent -- so glaring as to raise a duty to inquire. *HPI/GSA-3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004); *Metric Constructors, Inc. v. National Aeronautics & Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999). If contracting officer Knauer's deposition testimony is accurate, the problems he saw in West Ridge's proposal were so glaring that he *did* inquire about them and direct that they be removed.

It may well be that there was never a meeting of the minds as to this lease.[1] If Mr. Knauer is to be believed, he understood that the structure of West Ridge's offer was inconsistent with the requirements of the solicitation, informed West Ridge of this understanding, and directed that the offer be revised to meet those requirements. If the recollections of West Ridge's representatives are accurate, the alleged information and direction never occurred. In any event, Mr. Knauer, on behalf of GSA, accepted West Ridge's offer. What that offer was, and what that acceptance means, will have to await development of the record. *See Petula-Midrise IV, LLC v. General Services Administration*, GSBCA 16085, 06-2 BCA ¶ 33,386, at 165,518.

Decision

GSA's motion for summary relief is **DENIED**.

_____
STEPHEN M. DANIELS
Board Judge

We concur:

_____
ANTHONY S. BORWICK
Board Judge

_____
CATHERINE B. HYATT
Board Judge

[1] West Ridge asserts that "[w]here the Government accepts an offer that it could have rejected as non-responsive, the award constitutes acceptance of a counter-offer and binds the Government to the terms of that counter-offer." Appellant's Opposition to Respondent's Motion for Summary Relief at 7. In support of this proposition, the lessor cites *Bob Vandiver Office Equipment Co.*, GSBCA 4138, 75-1 BCA ¶ 11,004 (1974). While the proposition may be valid, *Vandiver* does not bind us. That decision was issued under the small claims procedure and therefore has no value as precedent. 41 U.S.C. § 608(e) (2006); Rule 52(b) (48 CFR 6101.52(b) (2007)). We will appreciate further briefing as to the legal implications of the Government's acceptance of a non-responsive offer.